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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SULTAN ALLIBHAI AND YASMIN ALLIBHAI,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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18

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Basis for Federal Jurisdiction	2
II. Statement of Facts	3
ARGUMENT	6
I. Is Reasonable Suspicion of Criminal Activity Required to Target an Individual for Investigation?	6
II. Assuming No "Reasonable Suspicion" Limitation on Targeting Discretion, May Agents Select Targets on the Basis of Activities Protected by the First Amendment?	9
A. The Fifth Circuit Incorrectly Analyzed this Question Under the Free Exercise Clause	9
B. The First Amendment Prohibits Baseless Investigative Targeting Focused on a Religious Group	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) 13
Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978) ... 12
Employment Division Department of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) 9,10,11
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963) 12
Greene v. United States, 454 F.2d 783 (9th Cir. 1971) 7
Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) 7,9
Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) 6
United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, __U.S. __, 111 S. Ct. 751, 112 L. Ed. 2d 771 (1991) 12
United States v. Allibhai, 939 F.2d 244 (1991) . 2
United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) 7
United States v. Driscoll, 852 F.2d 84 (3rd Cir. 1988) 11
United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990) 6,8,9,11,14
United States v. Lard, 734 F.2d 1290 (8th Cir. 1984) 8
United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983) 7
United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973) 7,9
United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978) 7
Wayte v. United States, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

18 U.S.C. § 1956 2
18 U.S.C. § 3231 3
28 U.S.C. § 1254 2

OTHER AUTHORITIES:

Gershman, ABSCAM, the Judiciary and the Ethics of Entrapment, 91 Yale L.J. 1565 (1982) 11
The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, 32 Crim. L. Rptr. 3087 (1983) 13

QUESTIONS PRESENTED

1. Whether government agents who lack any reason to suspect past, current, or incipient criminal activity legitimately may aim a money laundering "sting" operation at an individual who has never engaged in criminal activity of any kind?

2. Absent a reasonable suspicion requirement, is investigative discretion limited when targets are selected based on their exercise of a right secured by the First Amendment?

OPINIONS BELOW

The Fifth Circuit opinion appears at 939 F.2d 244 (1991).

JURISDICTION

The judgment of which the petitioner seeks review was entered August 6, 1991. No petition for rehearing was filed. No extension of time for filing this petition has been granted. Rule 12.3 is not applicable. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution of the United States. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment to the Constitution of the United States. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

The petitioners were indicted by a federal grand jury and tried for violations of the federal money laundering statute, 18 U.S.C. § 1956, and related crimes. The District Court for

the Northern District of Texas, Dallas Division, had jurisdiction in these criminal cases pursuant to 18 U.S.C. § 3231.

II. Statement of Facts

The appellate court summarized the facts relating to the Allibhais' investigation and arrests as follows:

> Acting on a tip from the Customs Service that Nizamudin Alibhai had been illegally transferring large sums of cash out of the United States, agents initiated an investigation of suspected money laundering activities in the Dallas area. Their information led them to a Dallas bank, where Nizamudin and the appellant Sultan Allibhai purportedly maintained accounts. Although agents confirmed Nizamudin and Sultan were not related, the appellant was nonetheless targeted by the government in its investigation.
>
> In order to gain access to Sultan and other suspected money launderers, the government enlisted the cooperation of Al Hassam, a former Dallas resident who was, like Sultan and others on the government's list of suspects, an Ismaili Muslim.[1] The agents contacted

[1] The appellants make much of their affiliation with the Ismaili Muslim community, a small subsect of the Shi'ite Muslim faith.* As a leader in the Dallas Ismaili community, Sultan collected the sums the Ismaili faithful were obliged to tithe to the Aga Khan, sending the money out of the United States. Sultan suggests that these legitimate activities first aroused the suspicions of government agencies.

> * [At sentencing, Sultan Allibhai submitted information on Ismaili history in an affidavit of Mahommed Jaffer and an academic paper, "The Ismailis: A Short Survey" by Jere L. Bacharach. These materials are appended to this petition.
>
> The history of the Ismaili Muslims extends 1400 years. (Jaffer Aff., App. p. 19-20.) Islam emerged in the seventh century A.D. (Bacharach at 1.) Early in Muslim history, a split developed between Sunni and Shi'ite Muslims over the identity of the rightful successor to Muhammad, believed to be Allah's last prophet. (Bacharach, App. p. 33-34.) Over the next century and a half, the Shi'ites, who were the smaller group, split into subgroups, including Ismailis. (*Id.* at 34-35.) Members of the sect number

(continued on page 4)

Hassam, presented him with a list of primarily Ismaili names, and asked him if he recognized any of those listed. Hassam indicated that Sultan was a childhood schoolmate, but he professed he was unaware of his involvement in any illegal activities.

The agents decided that Hassam would pose as an insurance agent interested in exporting large sums of honest or ill-gotten gains out [of] the United States for clients. Hassam contacted Sultan in Dallas, renewed their acquaintance, and invited him and his wife Yasmin to meet him at his hotel. At that meeting, Hassam indicated that he was looking for a money launderer, and asked Sultan for a recommendation. Sultan advised Hassam that he need look no further, as he had previously engaged in such activities in Africa.

Hassam and Sultan eventually agreed on the details of their business arrangement: money skimmed from the proceeds of legitimate businesses or derived from illicit drug trafficking would be transported out of the country by Sultan. For his efforts, Sultan would receive a "handling fee" equivalent to two and one-half percent of the sums laundered. Other details regarding their first transaction were left unresolved, and Hassam returned to his home in Virginia.

Over the next three months, Sultan and Yasmin

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[1] *(...continued)*

about 20 million and can be found throughout the world, particularly in India, Pakistan, and East Africa. (Jaffer Aff., App. p. 19.) There is a small community in the United States. *(Id.)*

Through the course of history, Ismailis have been persecuted for their faith, particularly by the Sunni Muslims. (*Id.* at 23.) Their concern for persecution continues into the twentieth century. (*Id.*) For that reason and because of their religious tradition, many Ismailis keep private the practice of their faith, including the process of making offerings to the Aga Khan, their spiritual leader. (*Id.*)

The petitioners are Ismaili Muslims. Sultan Allibhai is a muhki, or minister, in the Dallas Ismaili community.]

cooperated with Hassam in completing several transfers of money out of the United States. Typically, Hassam would meet Sultan at the appointed location, deliver to him a large sum of money in either large bills or cashier's checks, and provide Sultan with information as to where the money should be delivered. Sultan would carry the cash out of the country, neglecting to declare it on the U.S. Customs forms that require disclosure of cash sums in excess of $10,000. After arriving in Brussels or Toronto, Sultan would deposit the money into an account in a specified bank. Later, he would cause the money to be transferred via wire to bank accounts in the United States established and maintained for the purposes of such sting operations.

Throughout this time, Yasmin assisted Sultan in these activities by relaying messages to him from Hassam, or occasionally accepting cash deliveries from Hassam in her husband's stead. On at least one occasion, Yasmin made the actual delivery of the money to Brussels.

Later, the government substituted undercover agent Ralph Jacoby for Hassam as Sultan's contact. Jacoby represented to Sultan that he needed very large sums derived from illegal drug operations exported out of the country. Jacoby and Sultan agreed to do business on terms similar to those arranged with Hassam, with Sultan expressing interest in trafficking even larger sums than before. For the next several months, Sultan and Yasmin continued transporting money out of the country, frequently enlisting the aid of two co-defendants not parties to this appeal.

By the year's end, the government felt it had sufficient evidence to bring Sultan, Yasmin, and the two co-defendants to trial. It therefore suspended the sting operation for approximately six months. The government later reactivated the scheme, hoping to ferret out

> additional members of Sultan's organization. With renewed interest, Sultan and Yasmin revived their laundering activities, dealing with Agent Jacoby as before. By the time of their arrest, the players had laundered over $1.5 million [sic], for which the Allibhais received over $76,000 in commissions.
>
> Sultan, Yasmin, and two co-defendants were tried on twenty-four counts of conspiracy, money laundering, failing to file IRS currency transaction reports, failing to file customs reports, travel in interstate commerce with the intent to carry on unlawful activities, and wire fraud. Sultan was convicted on all counts, while Yasmin was convicted on three and acquitted on three.

Allibhai, 939 F.2d at 247-48. The Fifth Circuit affirmed all convictions.

ARGUMENT

Last April, this Court granted review of *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (*en banc*). 59 U.S.L.W. 3723 (April 26, 1991). *Jacobson* presents the question whether the government must have some reason to suspect criminal activity before targeting an individual in a "sting" operation. The Eighth Circuit declined to adopt such a requirement.

This case presents the same issue. In addition, it raises the question whether, even absent a reasonable suspicion requirement, there may exist improper grounds for targeting. Specifically, does a groundless investigation aimed at members of a minority religious group infringe upon First Amendment liberties?

I. Is Reasonable Suspicion of Criminal Activity Required to Target an Individual for Investigation?

Government agents targeted Allibhai and others in the Dallas Ismaili community for an undercover "sting" operation without reason to suspect past, current, or incipient criminal

activity. Allibhai raised the defense of outrageous government conduct.

The outrageous government conduct defense originated with a noted dissent in *Olmstead v. United States,* 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Justice Brandeis championed "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478. The defense enforces the principle that law enforcement agents must not generate crime merely for the sake of prosecuting and punishing a defendant. *See United States v. Ramirez,* 710 F.2d 535, 540 (9th Cir. 1983).

In *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), the Court allowed the possibility of a constitutional defense where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.,* 411 U.S. at 431-32 (*quoting Kinsella v. United States*, 361 U.S. 234, 246, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960).

In *Hampton v. United States,* 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), five justices rejected the claim that due process would never bar conviction, no matter how outrageous the government's conduct. Thus outrageous government conduct is a defense separate from entrapment, and available regardless of the defendant's predisposition. *Id.* at 492 (Powell, J., concurring, joined by Blackmun, J.), *Id.* at 497 (Brennan, J., dissenting, joined by Stewart, J. and Marshall, J.).

Appellate courts subsequently have overturned convictions obtained by government agents' over-involvement in the execution of crime.

For example, in *United States v. Bogart,* 783 F.2d 1428 (9th Cir. 1986), the court held that law enforcement conduct violates constitutional standards when government agents effectively generate new crimes merely for the sake of

pressing criminal charges against the defendant. *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978), held that due process barred the government from generating new crimes for the sake of prosecution and punishment when the defendant previously was lawfully and peaceably minding his own affairs. *Accord, Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (reversing convictions where government did not attach itself to an ongoing criminal enterprise but rather engaged in "creative activity").

In *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), the court held that the defendant was entrapped as a matter of law, but discussed outrageous government conduct as well:

> Finally, we should add that, apart from the entrapment defense, agent Anderson's over-involvement in conceiving and contriving the crimes here approached being 'so outrageous that due process principles should bar the government from invoking judicial process to obtain a conviction.' (Citations omitted) Anderson's conduct was not aimed at facilitating discovery or suppression of ongoing illicit dealings .... Rather it was aimed at creating new crimes for the sake of bringing criminal charges against Lard, who, before being induced, was lawfully and peacefully minding his own affairs....Concepts of fundamental fairness preclude us from putting our imprimatur on law enforcement overreaching conduct designed to instigate 'a criminal act by persons 'otherwise innocent in order to lure them to its commission and to punish them."

Id. at 1296-97.

Allibhai submitted to the Fifth Circuit that outrageous conduct may occur in the decision to undertake an investigation as well as in the pursuit of the investigation. Allibhai argued that commencement of a sting operation, without reason to suspect prior wrongdoing, is itself sufficient indication of government over-involvement or "creative activity," regardless of the government's level of participation in executing its criminal plan. Appealing to concerns

of fundamental fairness, he asked that the government be restrained from instigating random police investigations, intruding into the lives of individuals who are lawfully minding their business.

The Fifth Circuit declined to adopt a reasonable suspicion requirement for sting operations. It relied in part upon the Eighth Circuit's opinion in *Jacobson, supra,* holding that "[a defendant] has no constitutional right to be free of investigation." *Allibhai, supra (quoting Jacobson,* 916 F.2d at 469). The court held that the entrapment defense adequately remedied a situation in which a suspicionless investigation "ensnares a non-predisposed individual," blurring the distinction between the two defenses and founding both on lack of predisposition. That holding directly conflicts with this Court's decisions that outrageous government conduct, that is, government over-involvement in crime, may invalidate a conviction regardless of a defendant's predisposition. *See Russell, supra; Hampton, supra.* The Fifth Circuit effectively stated that a targeting decision could never, under any circumstances, amount to outrageous government conduct. *Id.* at 249.

II. Assuming No "Reasonable Suspicion" Limitation on Targeting Discretion, May Agents Select Targets on the Basis of Activities Protected by the First Amendment?

In *Jacobson,* the claim of improper investigation and targeting was based entirely upon the lack of reasonable suspicion. This case presents an additional factor: all of those targeted shared a common ethnicity and adherence to a minority religious faith.

A. The Fifth Circuit Incorrectly Analyzed this Question Under the Free Exercise Clause

Allibhai suggested to the Fifth Circuit that, if the court declined to require reasonable suspicion generally, it should impose limits where targets appeared to have been chosen

on an improper criterion. He submitted his case as an example of the potential for abuse in unfettered targeting discretion.

Responding to this claim, the Fifth Circuit invoked free exercise analysis, relying upon *Employment Division Department of Human Resources v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In *Smith,* two Native Americans were fired from their jobs for using peyote in a religious ceremony. When the state denied them unemployment benefits because of this "misconduct," they claimed a violation of their First Amendment free exercise rights. This Court upheld the state's action: "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.,* 108 L. Ed. 2d at 885.

Relying on *Smith* to validate the religious focus of the sting operation, the Fifth Circuit held:

> Although we recognize that this is not a case involving the free exercise clause, we consider the court's teachings in *Smith* persuasive on this issue. Ismaili Muslims are not "relieved ... from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [*Smith,* 110 S. Ct. at 1600], *quoting Minersville School District Board of Education v. Gobitis,* 310 U.S. 586, 594-595, 60 S. Ct. 1010, 1012-1013, 84 L. Ed. 1375 (1940). Thus, when the government seeks to enforce a "valid and neutral law of general applicability," *Smith,* 110 S. Ct. at 1600, the fact that an investigation incidentally targets a specific religious group does not render the investigation violative of the first amendment.

Allibhai, 939 F.2d at 250. Although the court "recognized" that no free exercise issue was presented, it applied free exercise analysis. The flaw in this reasoning is apparent. Allibhai did not contend that money laundering is an element of his religious practice or that being an Ismaili immunizes him from criminal liability under a generally applied statute.

Rather, he argued that his selection for targeting was improper because it arose from a groundless investigation focused exclusively upon members of his religious group.

In short, Allibhai sought no exemption from a generally applied law. The *Smith* reasoning rests on the pertinent law's neutrality toward religion and general application. Here the government selected Allibhai *because* he was an Ismaili Muslim. Allibhai challenges the *lack* of neutrality in the government's conduct toward his religion. He does not seek, as the *Smith* plaintiffs did, to single himself out; rather, he claims that the government singled him out. Free exercise analysis has no application to such a claim. The Fifth Circuit simply misapplied the *Smith* decision, treating the case as though the government had infiltrated an ongoing criminal enterprise that happened to involve a religious minority. *See id.* at 250. Its reasoning did not address the legitimacy of selecting targets on the basis of their religion.

B. The First Amendment Prohibits Baseless Investigative Targeting Focused on a Religious Group

This Court has not addressed the scope of the outrageous government conduct defense, which has been described as "at best elusive." *United States v. Driscoll,* 852 F.2d 84 (3rd Cir. 1988), *quoting United States v. Janotti,* 673 F.2d 578 (3rd Cir. 1982). Particularly if the Court declines to impose a generally applicable reasonable suspicion requirement, illumination of this check on investigative authority is warranted. It simply cannot be, as the Fifth Circuit assumed, that religious and ethnic groups are without protection from an investigation focused on them *because* of faith or color. *Jacobson* presents the question whether some reasonable suspicion is required before the government attempts to induce an individual into crime. Even a holding that agents may investigate without reasonable suspicion, however, would not determine their authority to investigate on any basis they wish. Here, it appears that agents selected targets, not randomly, but upon an improper criterion.

The absence of a reasonable suspicion requirement does not necessarily imply an absence of constitutional constraints on targeting discretion. Suspicionless investigations easily may become tools of political or religious oppression. *See* Gershman, *ABSCAM, the Judiciary and the Ethics of Entrapment,* 91 Yale L.J. 1565 (1982).

Where constitutional protections are at stake, this Court has restricted government discretion to investigate and prosecute:

> [A]lthough prosecutorial discretion is broad, it is not 'unfettered.' Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints. *United States v. Batschelder,* 442 U.S. 114, 125, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979) (footnote omitted). In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' *Bordenkircher v. Hayes, supra,* at 364, 54 L. Ed. 2d 604, 98 S. Ct. 663, *quoting Oyler v. Boles,* 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962), including the exercise of protected statutory and constitutional rights, *see United States v. Goodwin, supra,* at 372, 73 L. Ed. 2d 74, 102 S. Ct. 2485.

Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *see also Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 557, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963) (government may not investigate membership records of political or religious organizations without demonstrating "compelling and subordinating government interest").

The federal circuits enforce similar boundaries. For example, in *Ealy v. Littlejohn,* 569 F.2d 219 (5th Cir. 1978), the court prohibited groundless grand jury interrogation of members of a civil rights group, stating:

> It would be a sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of

> unpopular organizations on the pretext that their members might have some information relevant to a crime.

Id. at 229; *see also United States v. Aguilar,* 883 F.2d 662, 705 (9th Cir. 1989), *cert. denied,* ___ U.S. ___, 111 S. Ct. 751, 112 L. Ed. 771 (1991) (when government employs undercover informers to infiltrate political or religious groups it must show that its investigation is being conducted in good faith and not for the purposes of abridging First Amendment freedoms); *Clark v. Library of Congress,* 750 F.2d 89 (D.C. Cir. 1984) (government investigation of employee based on his political beliefs and activities must be justified by vital governmental interest).

The government's self-imposed guidelines recognize that investigations of minority or religious groups raise special concerns. One of the general principles governing the Attorney General's Guidelines reads as follows:

> In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution of the United States.

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, 32 Crim. L. Rptr. 3087 (1983). The guidelines classify investigations into political or religious groups or their members as "sensitive criminal matters" and impose higher standards of care and supervision in these cases. *Id.* at 3088-90.

Obviously, investigative targeting is permissible, no matter the subject, when a person's conduct draws suspicion of criminal activity. The Fifth Circuit holds that targeting is permissible even absent such suspicion. When the government targets innocent individuals, however, the question

must arise: if suspicion of crime is not the government's reason, what is? Certainly the object's adherence to an unpopular religious faith is not a legitimate motivation worthy of this Court's approval.

CONCLUSION

The Supreme Court has not addressed the question, presented in *Jacobson* and here, whether government agents may target previously law-abiding persons for "sting" operations. Neither has it defined the scope of the outrageous government conduct defense, particularly as it relates to targeting decisions.

Whether or not government agents may randomly choose targets for investigation, certainly they may not baselessly invade a particular religious faith, attempting to create crime and generate prosecution. The Fifth Circuit misapplied the law mandating government neutrality toward religion, authorizing government encroachment on First Amendment freedoms.

The legitimacy of suspicionless investigations, and particularly of such investigations directed at ethnic and religious minority groups, are important questions which have not been, but should be, settled by the Supreme Court.

Respectfully submitted,

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